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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND
YANK ELLINGTON,

Petitioners,

versus

THE STATE OF MISSISSIPPI.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Counsel for Respondent.

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OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

THE STATE OF MISSISSIPPI.

I.

Preliminary Statement.

Petitioners, Ed Brown, Henry Shields and Yank Ellington, were tried and convicted in the Circuit Court of Kemper County, Mississippi, on an indictment charging them with murder, and sentenced to be hanged by their necks until they, and each of them, were dead. They appealed to the Supreme Court of the State of Mississippi, where their conviction was affirmed, the decision of the Mississippi Supreme Court being reported in 158 So. 339, but not yet officially reported (R. 127, *et seq.*). Thereafter, petitioners filed a Suggestion of Error to the decision of the court (R. 138), and the court overruled that suggestion, its decision in this respect being reported in 161 So. 465,

but not yet officially reported (R. 166, *et seq.*). The petitioners have applied for writ of certiorari to bring before this Court for review the deciison of the Mississippi Supreme Court in response to the suggestion of error.

II.

Statute Relied on by Petitioners.

Petitioners base their right to a writ of certiorari upon the provisions of Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28, particularly that part of same which provides that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination, any cause wherein a final judgment has been rendered or passed by the highest court of a state,

> "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States;"

III.

Nature of Questions Raised by Petition.

In the main, petitioners rely upon two major propositions: (a) that the use of confessions by the state against petitioners at the time of their trial were extorted, and such use amounted to a deprivation of due process of law; and (b) that they were denied, in reality, representation by counsel to protect their interests at the trial. All other propositions advanced by petitioners are corollaries of the two foregoing main ones.

A. *The Confessions.*

At the time of the trial the state offered certain confessions alleged to have been made by petitioners, acknowledging guilt of the crime charged against them. When they were offered in evidence, the court required the jury to retire while it determined the competency of these confessions (R. 21). At this preliminary inquiry into the competency and admissibility of these confessions, the testimony showed that they were freely and voluntarily made (R. 21, *et seq.*). The petitioners, at this preliminary inquiry, presented no testimony to show that the confessions were otherwise. Thereupon, the trial judge held the confessions competent and admissible. The jury was returned to the box, and the confessions were related to it (R. 25). After the state had rested its case, the petitioners (defendants in the trial court), took the witness stand and testified in such a way as to make the competency of these confessions questionable. But, after their testimony was in, they thereafter made no motion to exclude, or resorted to any form of procedure calculated to require the trial judge to again pass upon the competency of these confessions.

Upon appeal to the Mississippi Supreme Court, the judgment of the trial court was affirmed, the court, as will be hereinafter pointed out, following established rules of procedure in affirming it (R. 127, *et seq.*).

It will therefore be seen that petitioners here base their right to a review under the statute above referred to upon the ground that the trial court erred in admitting evidence against them, and that the Supreme Court erred in upholding this ruling, so far as the confessions are concerned.

Decisions Showing what Necessary to be Done to Entitle Review Under Statute.

In order to give this Court jurisdiction under the statute relied on by petitioners, it must affirmatively appear that some title, right, privilege or immunity, under the Constitution of the United States, was specially set up or claimed in the court below. In the case sought to be reviewed here, no such claim was made in the trial court, nor in the Supreme Court of the State of Mississippi when the case was originally decided, but only on "Suggestion of Error," a suggestion filed by counsel that the court erred in its decision, itself in the nature of a re-argument after the court had decided the case on appeal. Injection of a "federal question" into the case came as an afterthought of counsel, and should be treated as such.

Spies v. *Illinois,* 123 U. S. 131, 181;
Baldwin v. *Kansas,* 129 U. S. 52;
Miller v. *Texas,* 153 U. S. 535, 538;
Brooks v. *Missouri,* 124 U. S. 394;
Brown v. *Massachusetts,* 144 U. S. 573;
Jacobi v. *Alabama,* 187 U. S. 133;
Caldwell v. *Texas,* 137 U. S. 692, 698;
Leeper v. *Texas,* 139 U. S. 462, 467.

The mere assertion that a federal question has been raised does not give this Court jurisdiction. The record must present such a question substantial in character and properly raised below.

Sugarman v. *United States,* 249 U. S. 182;
Zucht v. *King,* 260 U. S. 174;
Corrigan v. *Buckley,* 271 U. S. 323, 329.

This Court has held that a party is not entitled to a review here upon the ground that a state court has erred in admitting confessions or other evidence against them.

Barrington v. *Missouri*, 205 U. S. 483, 485, 486;
Ensign v. *Pennsylvania*, 227 U. S. 592;
Los Angeles Milling Company v. *Los Angeles*, 217 U. S. 217, 226.

The Federal Constitution does not guarantee immunity from self-incrimination, so far as the state courts are concerned.

Ensign v. *Pennsylvania*, 227 U. S. 592, 597;
Barron v. *Baltimore*, 7 Pet. 243;
Spies v. *Illinois*, 123 U. S. 131, 166;
Brown v. *New Jersey*, 175 U. S. 172;
Barrington v. *Missouri*, 205 U. S. 483;
Twining v. *New Jersey*, 211 U. S. 78, 93.

The State of Mississippi is free to regulate its own methods of procedure, as long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution, and the procedure adopted by the State of Mississippi does not run foul of the Fourteenth Amendment because another method may seem to be fairer and wiser or to give a surer promise of protection to the prisoner at the bar.

Jordan v. *Massachusetts*, 225 U. S. 167, 174, 32 Sup. Ct. Rep. 651, 56 L. Ed. 1038;
Twining v. *New Jersey*, 211 U. S. 78, 106, 111, 112;
Allen v. *Georgia*, 166 U. S. 138, 140;
Felts v. *Murphy*, 201 U. S. 123;
Rogers v. *Peck*, 199 U. S. 425, 434, 26 Sup. Ct. Rep. 87, 50 L. Ed. 256;
Frank v. *Mangum*, 237 U. S. 309;
Garland v. *Washington*, 232 U. S. 642, 645, 34 Sup. Ct. Rep. 456, 58 L. Ed. 772;

Ong Chang Wing v. *United States,* 218 U. S. 272, 279, 280, 31 Sup. Ct. Rep. 15, 54 L. Ed. 1040;
Snyder v. *Massachusetts,* 291 U. S. 97, 105, 54 Sup. Ct. Rep. 330, 90 A. L. R. 575, 78 L. Ed. 674;
Maxwell v. *Dow,* 176 U. S. 581, 604;
Hurtado v. *California,* 110 U. S. 516;
Powell v. *Alabama,* 287 U. S. 45, 67.

If the confessions had been erroneously admitted in evidence, there would have been no denial of due process of law.

Jones v. *Buffalo Creek Coal & Coke Co.,* 245 U. S. 328;
Central Land Co. v. *Laidley,* 159 U. S. 103;
Bonner v. *Gorman,* 213 U. S. 86;
Corrigan v. *Buckley,* 271 U. S. 323;
American Railway Express Co. v. *Kentucky,* 273 U. S. 269.

Petitioners Rely on Matters Aliunde the Record.

Petitioners rely principally upon the matters and things set up in the pleading which they captioned: "Motion in Arrest of Judgment and for New Trial" (R. 141, *et seq.*), which, together with the *ex parte* affidavits accompanying it, was filed in the Supreme Court of Mississippi, after the decision of that court on the merits of the case, and while a "Suggestion of Error" was pending there. These matters and things are not properly before this Court, and were not properly before the Mississippi Supreme Court, as pointed out in its decision (R. 172).

A motion in arrest of judgment will not lie in the Supreme Court of the State of Mississippi. This was pointed out by the court in its decision of the case at bar on suggestion of error (R. 172). As said in *State* v. *Joyner,* 148 Miss. 560, 114 So. 340:

> "A motion in arrest of judgment is confined to the record made in the trial. Its purpose is to search the

> record for errors made, not to make another and a different record. The matter complained of in the motion must be 'intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.' 34 C. J., Sec. 154, page 31."

The *ex parte* affidavits of the three petitioners, as well as that of their counsel, being a part of this motion in arrest of judgment, could not be considered by the Mississippi Supreme Court, and consequently, under the decisions of this Court, hereinafter referred to, this Court cannot consider any of the allegations and charges of the motion and the exhibits thereto.

As to the motion for new trial which was made a part of the motion in arrest of judgment, counsel says, (Brief, page 23) that this was done "on the theory that no opportunity had been afforded for filing same in the lower court". That may have been counsel's reason for doing so, but, under the law of Mississippi, the trial court was the proper place for such procedure.

In *Pittman* v. *State,* 147 Miss. 593, 113 So. 348, the Mississippi Court held, with reference to the action of a trial judge on a motion for new trial after the term, at which a judgment was entered, had expired:

> "When the term of court was finally adjourned, the appellant's right to file a motion for a new trial ended, and any action of the trial judge in reference to such a motion, which was filed after the adjournment of the term, was of no effect, and is not properly a part of this record."

The court further said, in this same case:

> "The verdict in this case was returned into court in the presence of able associate counsel for the appellant, and the record does not show that counsel requested any delay in order to enable them to present a motion for a new trial or in any way indicated to the

court that they desired to present any such motion, and this being true, the appellant cannot now complain that the court adjourned the term when it had completed all business before it."

Along the same line is the case of *Carter* v. *State*, 147 Miss. 171, 113 So. 177, where the record did not show that any oral proof was offered to substantiate any of the grounds set up in the motion for new trial.

In *Carraway* v. *State*, 167 Miss. 390, 148 So. 340, the Mississippi Supreme Court held, in substance, that a motion for a new trial will not lie after the term, at which a judgment was rendered, has expired. The lone exception to this rule is in the case of fraud, actually perpetrated in securing the judgment itself.

Counsel cry "Fraud! Fraud!" in this case. But it must be kept steadily in mind that if there is or was fraud in this case, the place for the motion was in the trial court where proof could be taken *pro et con*, and not in the Supreme Court of Mississippi, a court of review only. So far as the Mississippi court and this Court are concerned, this motion and exhibits thereto are beside the question and not open to consideration here. If there is "fraud" in this case, the place to remedy that situation is in the Circuit Court of Kemper County, Mississippi, the trial court, since a judgment procured by fraud is open to attack at any time. See: *Carraway* v. *State*, *supra*.

Rules of Procedure in Mississippi.

That the decision of the Mississippi Supreme Court, in the case at bar, followed the well established rules of procedure adopted in that state, it is only necessary to refer to the decisions of that court.

The Supreme Court of Mississippi is one of review only. Section 146 of the State Constitution provides that:

"The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

The Supreme Court of Mississippi can only act on the record as made in the trial court, and will not go outside of the record made at the trial in reviewing a judgment of a trial court.

City of Pascagoula v. *Delmas,* 157 Miss. 619, 128 So. 743;
Akroyd v. *State,* 107 Miss. 51, 64 So. 936;
Bufkin v. *State,* 134 Miss. 116, 98 So. 455;
Lee v. *State,* 160 Miss. 618, 134 So. 185;
Fairley v. *State,* 152 Miss. 656, 120 So. 747;
Whit v. *State,* 85 Miss. 208, 37 So. 809.

In *Jackson* v. *State,* 163 Miss. 235, 140 So. 683, the Supreme Court of Mississippi reviewed the authorities and stated the rule with reference to the necessity and scope of objections to evidence in a trial court, so as to enable an appellant to base error thereon in the Supreme Court. The rule was not only stated, but the reasons therefor given, as:

> "It is true that on objection thereto, on the specific ground that it was not freely and voluntarily made, a confession should not be admitted in evidence until shown to have been so made, but no such specific objection was made in the court below, and cannot be made in this Court for the first time.
>
> "Except as hereinafter stated, error in the admissibility of evidence can be predicated only on an objection thereto, specifically pointing out the infirmity therein. * * * (citing cases).
>
> "This is one of the most elementary rules of appellate court procedure, and should not be departed from for three reasons: (1) Unless an objection to evidence specifically points out the alleged infirmity therein, the trial court cannot intelligently rule on its admissibility; (2) the party offering the evidence should, in all fairness, be apprised of the alleged infirmity therein, so that he may, if he can, remove it; and (3) in order

that the parties to the litigation may be confined in the Supreme Court to the questions litigated in the trial court, the Supreme Court being a court of appellate jurisdiction only."

On precisely the same proposition, see:

Howard v. *Town of Newton,* 108 Miss. 548, 67 So. 49;
Boatwright v. *State,* 143 Miss. 676, 109 So. 710.

Not only must the objection to evidence be specific, but the objector is held to the same ground of his objection as in the trial court. He cannot assign a new ground upon review.

Peters v. *State,* 158 Miss. 530, 130 So. 695;
Marley v. *State,* 109 Miss. 717, 69 So. 210;
Conwill v. *State,* 147 Miss. 118, 112 So. 868;
Duckworth v. *Town of Taylorsville,* 142 Miss. 440, 107 So. 666;
Boutwell v. *State,* 165 Miss. 16, 143 So. 479.

It was held, in *Peters* v. *State, supra,* that the statement of one ground of objection constituted a waiver of all others.

It is also a rule of practice in Mississippi that where there is no objection to evidence in the trial court, the Supreme Court has nothing to review, nor is a trial court held to have committed error where it has not been called upon to rule upon a proposition. In other words, the Mississippi Supreme Court will not hold a trial court in error, unless such a trial court has been called upon to act, and has acted erroneously.

Boutwell v. *State,* 165 Miss. 16, 143 So. 479;
Grady v. *State,* 144 Miss. 778, 110 So. 225;
Salmon v. *State,* 151 Miss. 539, 118 So. 610;
Dugan v. *State,* 151 Miss. 781, 119 So. 298;
Taylor v. *State,* 148 Miss. 621, 114 So. 390.

The only exceptions to the rule just stated relate to jurisdictional matters, as, for instance, where the indictment charges no crime whatsoever:

Pittman v. *State,* 107 Miss. 154, 65 So. 123;
Reed v. *State,* 171 Miss. 65, 156 So. 650;

or where venue was not proved:

Pickle v. *State,* 137 Miss. 112, 102 So. 4;
Dorsey v. *State,* 141 Miss. 600, 106 So. 827;
Waldrup v. *State,* 150 Miss. 302, 116 So. 432.

Indeed, the Mississippi court has held that it must raise jurisdictional questions arising on the record *ex mero motu.*

City of Lumberton v. *Frederick,* 164 Miss. 456, 143 So. 488.

As to the admission of confessions in evidence, the law of Mississippi is that an involuntary confession, for whatever reason involuntary, is not admissible. The law on this subject is treated in petitioners' brief and the law on it is conceded as set out therein on this particular point.

The competency of a confession is a matter for the trial court to pass upon, and the trial judge passes upon it as and when it is offered in evidence.

Simmons v. *State,* 61 Miss. 243;
Ellis v. *State,* 65 Miss. 44, 3 So. 188;
Lipscomb v. *State,* 75 Miss. 582, 23 So. 210;
Durham v. *State,* 158 Miss. 833, 131 So. 422;
Tyler v. *State,* 159 Miss. 223, 131 So. 417;
Whittaker v. *State,* 169 Miss. 517, 142 So. 474;
Smith v. *State,* 165 Miss. 462, 144 So. 233.

When a confession is offered in evidence, the party against whom it is sought to be used may, if he requests it, have the court determine its competency *vel non* in the absence of the jury.

Ellis v. *State,* 65 Miss. 44, 3 So. 188;
Lee v. *State,* 137 Miss. 329, 102 So. 296;

Randolph v. *State*, 152 Miss. 48, 118 So. 354;
Fletcher v. *State*, 159 Miss. 41, 131 So. 251;
Jackson v. *State*, 163 Miss. 235, 140 So. 683.

When a preliminary inquiry into the admissibility of a confession is requested and allowed by the trial court, it is the duty of the defendant, at that time, to show, if he can, the involuntary character of such alleged confession.

Perkins v. *State*, 160 Miss. 720, 135 So. 357;
Weatherford v. *State*, 164 Miss. 888, 143 So. 853;
Lee v. *State*, 137 Miss. 329, 102 So. 296;
Ellis v. *State*, 65 Miss. 44, 3 So. 188.

As pointed out by the Mississippi court in the decision of this case, the showing upon preliminary inquiry into the competency of the confessions satisfied that they were voluntary. There was nothing to the contrary shown by petitioners or anyone else. Afterwards, when petitioners were testifying on the merits, they testified in such a way as to throw doubt upon the competency of their confessions. But they never, from that time on, called upon the court by any procedural step which would have required it to again rule upon the competency of those confessions. The Mississippi Supreme Court, in reviewing this trial, merely followed old, well-established rules of practice and procedure, as set out hereinabove, and particularly the case of *Loftin* v. *State*, 150 Miss. 228, 116 So. 435, which was squarely in point, and affirmed the conviction, so far as the confessions were concerned.

Petitioners, in this proceeding, can only complain of their own failure to proceed along the orderly lines of procedure marked out by the courts of this State. As pointed out in the decision of the Mississippi court (R. 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the

appellants (petitioners here) request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of every race and color, are equal at the bar of this Court, and we would feel deeply humiliated if the contrary could be justly said."

B. *Alleged Denial of Counsel.*

Except as set out in the "Motion in Arrest of Judgment and for New Trial", and the *ex parte* affidavits attached thereto, and which, as pointed out above, have no place in this proceeding, there is nothing to show whether counsel who represented petitioners at the trial were appointed by the court, or employed by petitioners themselves, except the inference noted by petitioners as being deducible from certain testimony shown at the bottom of page 54 of the record before this Court.

In the case of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55, which is relied on exclusively by petitioners on this ground, it is distinctly set out by the court that the record disclosed the circumstances under which counsel was "appointed" by the court. From the record now before the Court in this case, there is nothing upon which to base an argument of denial of counsel unless we allow our imagination to run wild. The Mississippi court, in refusing this suggestion of error, said (Record court, in refusing this suggestion of error, said (R. 172):

"No request was made of the court to continue the case, to pass it to a later day, or to grant the appellants any further time for the preparation of their case.

"The attorneys who defended the appellants in the court below are able lawyers of extensive practice—veterans of many forensic conflicts; and the record does not disclose that they consciously failed to discharge any duty they owed the appellants."

Since there was nothing in the record properly before the Mississippi court, upon which it could review this alleged error, there is nothing which this Court can review.

Spies v. *Illinois*, 123 U. S. 131, 181;
Baldwin v. *Kansas*, 129 U. S. 52;
Miller v. *Texas*, 153 U. S. 535, 538;
Brooks v. *Missouri*, 124 U. S. 394;
Brown v. *Massachusetts*, 144 U. S. 573;
Jacobi v. *Alabama*, 187 U. S. 133;
Caldwell v. *Texas*, 137 U. S. 692, 698;
Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291.

C. *Alleged Fraud of State Agents.*

There is no analogy as between the facts of the case at bar and the facts of *Mooney* v. *Holohan* (U. S.), 79 L. Ed. (not yet officially reported). As aptly put by the Mississippi court (R. 170):

> "*Mooney* v. *Holohan*, L. Ed. Adv. Opinion, Vol. 79, p. 347, is cited and relied on by the appellants but its relevancy here is not apparent. There the charge was that Mooney was convicted on perjured evidence, known to be such by the prosecuting officer, who suppressed evidence, unknown to Mooney, in impeachment thereof. No charge, either of perjury, or the suppression of evidence, is here made. On the contrary, all of the facts as to the confessions being coerced were known to the appellants when they were offered and were provable by their own personal testimony."

This statement of the Mississippi court, which is sustained by the record which was before it, and which is now before this Court, is a complete answer to petitioners' claim. There is absolutely no showing of fraud, and no fraud was claimed in the Mississippi court until after the supreme court had decided the appeal on its merits. On suggestion of error, fraud was charged, but there is nothing

in the entire record, which is properly before the Court upon which a charge of fraud may be sustained. Under the decisions of this Court, above set out, since there was nothing before the Mississippi Supreme Court upon which this charge might be based, there is nothing upon which this Court can review this charge of fraud.

Conclusion.

With reference to the right of petitioners to have this Court review their conviction upon the ground that the use of extorted confessions against them constituted a denial of due process of law, the State of Mississippi submits:

(1) That petitioners are not entitled to a review by this Court, merely because the court may have ruled erroneously so far as the introduction of testimony was concerned;

(2) That mere rules of procedure are involved in this matter, and the State of Mississippi has the right to formulate and regulate its own methods of procedure, so long as they operate on all alike and do not interfere with the petitioners' day in court and their right to be heard—it not having been shown by the record that there has been any arbitrary exercise of any powers over petitioners, or that they have been treated any differently than any other defendant under the same circumstances; and

(3) That no title, right, privilege or immunity, under the Constitution of the United States, was specially set up or claimed in the trial court, nor was anything of this nature claimed until after the Mississippi Supreme Court had affirmed the conviction.

From an inspection of the record petitioners have placed before the Court, it will be seen that petitioners' whole case is irretrievably bound, top, side and bottom, upon the allegations of the "Motion in Arrest of Judgment and for

New Trial" and the *ex parte* affidavits attached to and forming a part thereof; and since, under the decisions of this Court, the Mississippi court could not take into consideration the matters and things alleged, this Court, sitting in review, can do no more. Upon the record now before this Court there is and has been no "Federal question" raised sufficient to entitle petitioners to a review here.

For the foregoing reasons, the State of Mississippi submits that petitioners have not brought their case within the provisions of the statute under which they seek a review, and that this Court should deny the writ prayed for because this Court, under the circumstances, has no jurisdiction in the premises.

Respectfully submitted,

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